United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-1453

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT X

UNITED STATES OF AMERICA, *

Appellee, *

-against- *

KENNETH BROWN, *

Appellant. *

X

To be argued by
ROBERT SCHMUKLER, ESQ.

Docket No.
76 Cr. 1453

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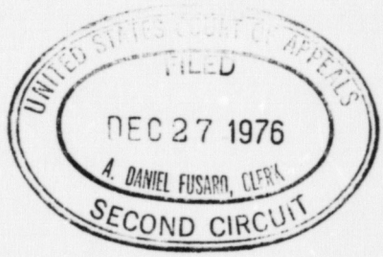
P/S

On Appeal from the United States District Court
For the Southern District of New York

Appellant's Brief



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BRIEF FOR APPELLANT

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Was the Indictment herein sufficient with respect to charging defendant Kenneth Brown with aiding and abetting the commission of the crimes charged in Counts 2, 3, and 4 thereof?

2. Did the Indictment sufficiently allege an overt act in furtherance of the alleged conspiracy so as to justify a conviction under Count 1 of the Indictment?

PRELIMINARY STATEMENT

The appellant, Kenneth Brown, was arrested on May 1, 1976. An indictment charging him with conspiracy to commit offenses against the United States (Count 1), robbery of a post-office with a dangerous weapon (Counts 2 & 3) and possession of stolen money orders (Count 4) was filed against him on May 13, 1976.

The appellant pleaded not guilty on May 20, 1976. Following a seven day trial, the jury found the appellant guilty on all four counts. On September 21, 1976 a judgment was filed, sentencing the appellant to a term of imprisonment of three (3) years on count one, and a five year term on count four, to run consecutively. The appellant was sentenced to a suspended term of twenty-five (25) years on counts two and three, to be followed by a period of one day of unsupervised probation.

This is an appeal from the conviction below.

STATEMENT OF FACTS

On May 1, 1976 at 7:45 A.M., the Hell Gate branch of the United States Postal Service was robbed by three armed, but unidentified men. A large quantity of blank postal money orders, a validating machine and plates, and various metal post office boxes containing post office stamps, and other property were removed from the premises during the course of the robbery.

Several hours later appellant, Eric Daniels, called Katherine Stubbington and told her that he had a quantity of postal money orders, and needed identification documents. She informed Inspector Mackin of the Postal Inspection Service of this call, and in a subsequent call to Eric Daniels told Daniels that she had a man who could supply identification papers. Stubbington and Postal Inspector Monroe in an undercover capacity, proceeded to 22 West 121st Street in Manhattan. They gained entrance to an apartment which was then occupied by Kenneth Brown, Sylvia Diaz (an indicted co-conspirator whose case was severed) and Don Daniels. During the subsequent conversation with the three defendants, Kenneth Brown seemed most interested in whether he could obtain a false motor vehicle registration for a Mercedes Benz car. Monroe and Stubbington also discussed obtaining other false indentification for the purpose of cashing the money orders. Monroe and Stubbington left the apartment at approximately 4:15 P.M.. Sometime thereafter agents arrested the defendants, Kenneth Brown, Eric Daniels, and Don Daniels after they entered a car near the building. Subsequently and before receiving a search warrant, agents broke into the apartment allegedly looking for Sylvia Diaz. Allegedly no search of the apartment took place till 9P.M. when a search warrant was brought to

the agents at the apartment.

During the course of the subsequent trial, one Patricia Booth Cornwall, an admitted co-conspirator, testified that she and Don Daniels had planned the robbery and brought in Eric Daniels and Kenneth Brown as co-conspirators. In return for her cooperation with the United States Attorney she was allowed to plead guilty to a conspiracy count. She implicated Kenneth Brown as the man who supplied the handgun, subsequently recovered, and as one of the men who were to commit the actual robbery. Her testimony regarding the evening of April 29, 1976, when Kenneth Brown allegedly brought the handgun to her apartment was rebutted by the testimony of Marsha Daniels, the sister of the defendants Eric Daniels and Don Daniels. Marsha Daniels testified that she was present on that night, and the alleged transaction with the handgun never occurred.

POINT I THE CHARGE OF AIDING AND ABETTING WAS PREJUDICIAL SINCE NO ACT OF AIDING AND ABETTING WAS CHARGED IN THE INDICTMENT

Rule 7 of the Federal Rules of Criminal Procedure requires that the Indictment set forth the essential facts constituting the offense charged. 18 U.S.C. Rule 7. It further requires the citation of the statute which the indictment charges has been violated. However, the Rule specifically provides that an error or omission in the citation is harmless.

It is also clear that a conviction may be sustained based on a statute or rule other than the one cited in the indictment provided the facts alleged in the indictment are sufficient to constitute a charge that such uncited statute has been violated. Williams v. United States, 168 U.S. 382, 399; United States v. Hutcheson, 312 U.S. 219, 229.

An indictment should advise a defendant of the nature and cause of the accusation. Wong Tai v. United States, 273 U.S. 77. In the instant case, Counts Two, Three and Four of the Indictment allege that defendants were the principals in certain criminal activities. (Appendix, pp. 6,7.) The case citation following each count has the notation, in parentheses, "Title 18, United States

Code, Sections 2114 (500 in Count Four) and 2." The actual allegations in these three counts of the Indictment do not mention the words "aided","caused", "assisted", or "abetted" or any other words of similar import.

The charge concerning aiding and abetting is prejudicial under the circumstances of this case since it suggested to the jury a "short-cut" for convicting defendant Kenneth Brown without finding that he was a participant in the conspiracy which was the essence of the Government's case against Brown. No witness identified Brown as a participant in the post office robbery. The only evidence against Brown was his presence in a room where the other defendants were with the stolen property and the testimony of one witness (a Co-conspirator) that Brown showed her a gun on one occasion. Under those circumstances the charge (Appendix, pp. 9-1340, 9-1341) to the jury on aiding and abetting was prejudicial to Brown since it suggested to the jury that they could convict him without finding he was a member of the conspiracy.

While this court has held that an indictment need not specifically allege a violation of the aiding and abetting statute (18 U.S.C. § 2), such a rule should not hold in all cases. United States v. Taylor, 464 F.2d 240 (1972),; United States v. Houle, 490 F.2d 970 (1973). It seems that 18 U.S.C. Section 2 is not a substantive

section and one may not be convicted for violating only that section. United States v. Schweig, 316 F.Supp. 1148, at 1161 n. 4, citing, United States v. Campbell, 426 F.2d 547, 553 (2d Cir. 1970).

In view of the procedural rather than substantive nature of the aiding and abetting statute, it is respectively submitted that this court ought to establish the bounds of its use. To permit its automatic invocation in every criminal prosecution without any allegation that any defendant aided and abetted the commission of a crime countenances a potential injustice. It permits a charge that must influence a jury that is based on implied boilerplate. In a conspiracy case it catches the defendant off-guard and permits a conviction even where the jury is not convinced as to the participation of the defendant in the conspiracy.

Notwithstanding cases to the contrary, it is respectfully submitted that the court ought to require some allegation in the indictment before aiding and abetting may be charged.

POINT II COUNT ONE OF THE INDICTMENT FAILS TO ALLEGE AN INDEPENDENT OVERT ACT IN FURTHERANCE OF THE CONSPIRACY CHARGED THEREIN

In Count One of the Indictment (Appendix, pp. 3-5), defendants are charged with violating the Federal conspiracy statute. 18 U.S.C. §§ 371. This Count sets forth seven alleged "overt acts" in furtherance of the conspiracy. It is clear that the statute requires that there be an overt act in furtherance of the conspiracy before there can be any crime.

An allegation must be made of at least one independant overt act apart from the act or acts establishing or creating the conspiracy. As one judge phrased the requirement:

> The overt act must be entirely independent of the conspiracy. It must not be one of a series of acts constituting the agreement; but it must be a subsequent independent act following a complete agreement or conspiracy, and done to carry into effect the object of the original agreement. United States v. Grossman, 55 F.Supp. 408 at 410 (EDNY 1931).

Of the seven alleged overt acts set forth in Count One of the Indictment, three merely allege the presence of a number of the defendants in the same location. Such allegations tend to establish neither the commission of an overt act nor the independence

of such occasions from the entry into the conspiracy. That is, the mere presence of several defendants in the same place may be the occasions for the undertaking of the conspiracy. But they are certainly not independent overt acts.

Two of the alleged overt acts are mere recitals that two of the co-conspirators had conversations. The allegations do not recite what the conversations involved. Again, the mere occurance of conversations between two co-conspirators is consistent with the entry by them into the conspiracy. But, without an allegation as to the subject matter of the conversations, the allegation does not charge an independent overt act in furtherance of the conspiracy.

The remaining two allegations of overt acts (Numbers 1 and 2, Appendix at pp.4-5) charge two of the co-conspirators with making a list and preparing a diagram. While these appear to allege overt acts, the testimony makes it clear that these steps were the initial entering into the conspiracy on the part of the first two co-conspirators. As such, these acts do not constitute overt acts in furtherance of the conspiracy. Rather, they are the intial "contract" in the conspiracy. United States v. Hall, 474 F.2d 1047 (1973).

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee, -against- ERIC DANIELS, DON DANIELS, AND KENNETH BROWN. Appellants.	*	Docket No. 76 Cr. 1453 Affirmation of Service

ROBERT SCHMUKLER an attorney admitted tc practice in the Courts of New York State makes the following affirmation under penalty of perjury.

On December 27, 1976 affirmant served the within brief on appeal upon William Kelleher Jr. attorney for United States in this action at 1 St. Andrew's Plaza, New York, New York the address designated by said attorney for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in -a post office- official depository under the exculsive care and custody of the United States Postal Service within the State of New York.

ROBERT SCHMUKLER

Dated: December 27, 1976
Brooklyn, New York

Pursuant to the Federal Rules of Appellate Procedure, all arguments advanced by co-Appellants herein are hereby incorporated by reference.

CONCLUSION

The Appellent's conviction should be reversed.

Respectfully submitted,

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